WC 07-149

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
The Petition of Telcordia Technologies, Inc. To Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration	)	WCB Docket No. _____

PETITION OF TELCORDIA TECHNOLOGIES

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13 June 2007

SUMMARY

When Congress passed the Telecommunications Act of 1996, it recognized competition leads to better service at lower prices and mandated that the Commission establish policies opening all telecommunications markets to competition. Congress also required all local telephone companies to provide number portability, and directed the Commission to create a competitively neutral number porting mechanism.

Contrary to the Commission's original plans and Congress' intent, number portability administration services are now provided by a single vendor, NeuStar, Inc. In 2006, the contract for providing these services was amended in a way that effectively ensures that the current vendor will be immune from competition for at least five years. This contract amendment – called Amendment 57 – provides this effective immunity from competition by imposing severe financial penalties on industry and consumers if there is any attempt to end NeuStar's monopoly before 2012. These penalties, if imposed, would total roughly $30 million in 2008 and more in later years. They make the introduction of competition effectively impossible and, thus, violate public policy as set forth by Congress, the Commission and the antitrust laws. Moreover, the introduction of competition would lead quickly to number porting administration services being offered at a rate at least 20% less than the cost now being charged – saving industry and consumers roughly $60 million per year. Accordingly, in this Petition, Telcordia Technologies, Inc. asks the Commission to reform Amendment 57 by eliminating the anticompetitive financial penalty provisions and to initiate an open competitive bidding process for number portability administration services.

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PETITION OF TELCORDIA TECHNOLOGIES

When Congress passed the landmark Telecommunications Act of 1996, it recognized that competition leads to better service at lower prices. It mandated that the Commission establish policies "*opening all telecommunications markets to competition.*"[1] In order for consumers to be able to exercise real choice among competing telephone companies, Congress also required all local telephone companies to provide number portability, and directed the Commission to create a competitively neutral number porting mechanism.

Contrary to the Commission's original plans and Congress' intent,[2] number portability administration services are now provided by a single vendor. In 2006, the contract for providing these services was amended in a way that effectively ensures that the current vendor, NeuStar Inc., will be immune from competition (or even a reduction

1 *See* S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996).

2 Congress also mandated competition in markets providing services to telecommunications carriers. Sections 257(a) and (b) of the Communications Act state that it is national policy to promote "vigorous economic competition, technological advancement and promotion of the public interest" in all aspects of the telecommunications market, *including in the provision of services to "providers of telecommunications services and information services.*" (emphasis supplied).

in its own price schedule) for at least five years. This contract amendment – called Amendment 57 – provides this effective immunity from competition by imposing severe financial penalties on industry and consumers if there is any attempt to end NeuStar's monopoly before 2012.

Telcordia Technologies, Inc., is a provider of number portability administration services around the world. *It hereby asks the Commission to reform* Amendment 57 to eliminate these financial penalty provisions and to direct the North American Portability Management, LLC (NAPM) – the industry consortium established with Commission approval to contract for number portability services – to implement an open competitive bidding process for such services.[3] The Commission, implementing Congress' 1996 mandate, should use its plenary authority over number portability to ensure that the market for number porting administration becomes competitive as it had intended.

Number portability administration services at current prices will cost the industry, and thus consumers, approximately $300 million in 2007. That amount is likely to grow to $400 million per year by January 2012, when the penalty provisions of Amendment 57 expire. Telcordia believes that introduction of competition would lead quickly to number porting administration services being offered at a rate at least 20% less than the cost now being charged. *This means eliminating the penalty provisions and conducting an open competitive bidding process for number portability administration services would save consumers at least $240 million through January 2012.* In 2007 alone, industry and consumers would have saved at least $50 million had competition been in place. In 2008, competition in number portability administration would lead to savings of at least $60

[3] The provisions that should be struck are: Section 8.3 in its entirety; references to Upward Triggering Event in Amendment 57; Section 9 in its entirety; and Section 13.2 in its entirety. *See* Exhibit A (Amendment 57) (downloaded from www.sec.gov on June 11, 2007).

million. In later years, as number portability transactions increase, the savings would be even higher.

The Commission must also take action because the financial penalty provisions of Amendment 57 are anticompetitive, unjust and unreasonable. They also violate public policy as set forth by Congress, the Commission and by antitrust law. Under Amendment 57, if NAPM were simply to issue a Request for Information from potential competitors, NeuStar would increase its yearly charges for number portability in 2008 by about $30 million – with the penalty continuing to grow as transaction volumes grow in future years. This price increase would not result from any increased costs, or any *actual* competitive losses to NeuStar, or any *actual* reduction in contractual volume – but from the mere act of formally considering opening the market to competition. The purpose of the Amendment 57 penalty provisions are plain – to deter the possibility of competition. These provisions, which penalize the buyer for taking steps even to consider competition, constitute exclusionary conduct by a vendor with market power and cannot be justified.

BACKGROUND

When it mandated competition in the local wireline market, Congress directed the Commission to establish a competitively neutral number porting process whose cost would be shared among all carriers and, eventually, be borne by consumers. To ensure that porting would be done in a fair, effective, and cost-efficient manner the Commission set up an administrative structure designed to allow non-profit industry regional limited liability companies (LLCs) to select porting contractors in a competitive market.

From the start of its efforts to implement number portability, the Commission has embraced the concept of competition between porting administration contractors. The

Commission, in the *Telephone Number Portability First Report and Order*,[4] concluded that "it is in the public interest for the number portability databases to be administered by one or more neutral third parties." The Commission directed the North American Numbering Council (NANC) "to select as a local number portability administrator(s) ('LNPA(s)') one or more independent, non-governmental entities that are not aligned with any particular telecommunications industry." *Id.* at 8399-8402.[5]

The Commission specifically charged the NANC with "determin[ing], in the first instance, whether one or multiple administrators should be selected . . . ." *Id.* at 8402. In response, the NANC identified two advantages that would result from the selection of multiple database administrators.[6] First, multiple database administrators would create competition in both the competitive bidding and selection processes. "[H]aving multiple database administrators . . . should enable carriers to obtain *more favorable terms and conditions than if only one database administrator had been selected.*" *Id.* (emphasis supplied). Second, multiple administrators would provide a "back-up" system if one administrator could not or would not perform its obligations under its Master Agreement or declined to renew its Agreement. The other administrators, because of their experience and expertise, could provide these services quickly and with minimal disruption to the industry. *Id.* As a result, the NANC said "*that the selection of two*

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4 *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd. 8352, 8400 (1996) ("*First Report and Order*").

5 The Commission delegated general oversight of number portability to the NANC. The Commission adopted the NANC's recommendation that seven regional limited liability corporations provide immediate oversight and management of local number portability administration. *See* 47 C.F.R. 52.12, et seq.

6 *Telephone Number Portability*, Second Report and Order, 12 FCC Rcd. 12281, 12305 (1997) ("*Second Report and Order*").

database administrators is consistent with the Commission's directive that the NANC recommend the most cost-effective number portability." *Id.* (emphasis supplied).

By the time the NANC submitted its recommendations to the Commission, two database administrators had in fact been selected by the regional LLCs under the auspices of the NANC for this purpose: Lockheed Martin IMS and Perot Systems. *Second Report and Order*, 12 FCC Rcd. at 12306-7. The NANC found it unnecessary to make a specific recommendation because two different administrators had already been selected, but it noted that if the regional LLCs had selected a single administrator, the NANC would have reviewed the situation. *Id.* The Commission agreed with the NANC "*that there are clear advantages to having at least two experienced number portability database administrators that can compete with and substitute for each other, thereby promoting cost-effectiveness and reliability* in the provision of Number Portability Administration Center services." *Id.* (emphasis supplied).

NeuStar became the sole number portability database administrator by happenstance, and not by deliberate choice by the Commission or the NANC. By 1998, it became apparent that Perot Systems would be unable to begin operations on time.[7] At that time, those regional LLCs that had not initially selected NeuStar terminated their contracts with Perot Systems and signed contracts with NeuStar. By default, NeuStar became the sole number portability administrator in the United States.

Since the initial competitive bidding process conducted by the regional number portability administration LLCs ten years ago, the NeuStar contract has never been

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[7] *Telephone Number Portability*, Second Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 21204, 21208-9 (1998).

subject to open, competitive re-bidding. NeuStar is, today, the sole provider of number porting administration services in the United States.

AMENDMENT 57 AND THE PENALTY PROVISIONS

In March 2006, NAPM (the successor to the regional LLCs) and NeuStar entered into discussions to amend the Master Agreement governing the provision of number portability administration services.[8] The Master Agreement was set to expire in 2011. In September 2006, NAPM and NeuStar, after six months of negotiations, agreed to a contract extension, which was termed Amendment 57. Amendment 57 provides for a four-year extension of the Master Agreement from 2011 to 2015. With this extension, NeuStar's contract has been extended a total of 12 years (since the expiration of the first five year contract in 2003) without the benefit of competitive bidding processes.[9] This new extension did not become public until November 2006.

In exchange for this contract extension, Amendment 57 provides a volume-based reduction in the per-transaction porting rates.[10] But Amendment 57 does more than provide a discount in exchange for a contract extension. In what purports to be a non-exclusive agreement without any minimum purchase commitments, Amendment 57 financially punishes NAPM (and thus industry and consumers) by instituting a significant

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[8] NAPM LLC is the successor in interest to the seven original regional LLCs (the Northeast Carrier Acquisition Company, LLC; LNP, LLC (Midwest); Southwest Region Portability Company, LLC; Western Regional Telephone Number Portability, LLC; Southeast Number Portability Administration Company, LLC; Mid-Atlantic Carrier Acquisition Company, LLC; and West Coast Portability Services, LLC). Despite the merger of the seven separate LLCs into the NAPM LLC the seven separate Master Agreements have been maintained as distinct and separate contractual relationships. Any differences in the seven Master Agreements do not affect the issues raised by this petition, which for the sake of simplicity will refer to a single Master Agreement.

[9] Section 7 of Amendment 57.

[10] Nevertheless, if transaction volumes continue to rise as they have been rising, the costs to the industry and the public for number portability administration services will be greater than they are today.

per-transaction penalty (amounting to well over $30 million per year based on projected 2008 volumes and penalty rates[11]) for an *attempt* to seek lower rates from NeuStar, the Commission, or from anyone else. Specifically Section 8.3(b) provides that any of the following acts by NAPM triggers the financial penalty in Amendment 57:

> (i) seeking, or otherwise attempting, to renegotiate a lower charge [from NeuStar] per TN Porting Event or Effective Rate than the then-current charges per TN Porting Event or an Effective Rate in Exhibit E, or the calculation method for deriving such charges per TN Porting Event or the Effective Rate that results in a lower rate for the then-current charges per TN Porting Event or the Effective Rate in Exhibit E, or the introduction of any terms or conditions under the Master Agreement that could reduce the charges per TN Porting Event or the Effective Rate in Exhibit E, or the calculation method for deriving charges per TN Porting Event or Effective Rate in Exhibit E;
>
> (ii) issuing a request for information (RFI), a request for quotation (RFQ), a request for proposals (RFP) or other similar request for the provision of NPAC/SMS-type services in any United States Area;
>
> (iii) advocating, endorsing, adopting, or approving the development, implementation or use of an alternative TN-level routing administration capability;
>
> (iv) accepting or approving a proposal or offer, whether solicited or unsolicited, to provide NPAC/SMS-type services in any United States Service Area.[12]

In short, Amendment 57 penalizes NAPM by raising prices for porting transactions if NAPM: (1) *requests* from Telcordia (or anyone else) information about its capability to

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[11] The penalty provision imposes a 9 cent per transaction penalty in 2007 and 2008, and a 9 cent per transaction penalty in 2009-2011 up to a cap of $0.95/transaction in 2009-2011. In 2009-2011, if transactions are less than 300 million/year, the penalty is $.04/transaction. However, 2007 transactions are expected to be at or over 300 million, so it is unlikely that the reduced $.04/transaction penalty would be applicable.

[12] Section 8.3 provides "upon the occurrence of any Customer Modification Event (as defined in Section 8.3(b) below) under any of the Master Agreements between Contractor and Customer on behalf of the Subscribing Customers . . . , the charge per TN Porting Event under Rate Card 3 and the Effective Rate Card 4 then-used under Exhibit E in calculating the monthly Aggregate Porting Charge for the Service Area shall be adjusted (such an adjustment the "Upward Event Triggering Charge Adjustment") by increasing the charge per TN Porting Event under Rate Card 3 and the Effective Rate under Rate Card 4 by Nine Cents ($0.09) (such added amount known as the "Increased Charge Amount").

provide porting administration services in competition with NeuStar; (2) *seeks* a quotation or bid from Telcordia (or anyone else); (3) *approves* an unsolicited offer from Telcordia (or anyone else); (4) *endorses the idea of creating an alternative routing administration capability*; (5) or even asks NeuStar for a lower rate.[13] Amendment 57 also imposes the financial penalty if NAPM makes any "public statement" about having an interest in competition or lower rates.

In addition, the penalty provision is designed *to limit what this Commission is told.* Amendment 57 also imposes the financial penalty if this Commission takes steps to require competition and NAPM "including its co-chairs and members in their duly authorized, official capacity as members" have had the temerity to "advocate, endorse, lobby, orchestrate, whether directly or indirectly" the Commission's pro-competitive actions.[14] In other words, NAPM would be punished were it to support this Petition.

Finally, Section 9 of Amendment 57 provides "the fact that discussions or negotiations are taking place between the Parties concerning any amendment or proposed amendment" is confidential. This means that any negotiations between NeuStar and NAPM to amend the Master Agreement – including further extending the term – would effectively be hidden from potential competitors, the NANC and even the Commission. The negotiations can only be disclosed "to communicate the fact that the Parties did not conclude such a definitive amendment." Even then, "the terms, conditions or other facts" of a failed negotiation cannot be disclosed.

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[13] The penalty can be triggered either by NAPM or by a member of NAPM acting on behalf of NAPM.

[14] Amendment 57, Section 8.3c(ii).

The penalty provisions of Amendment 57 have no legitimate purpose. These provisions are not, for example, minimum annual volume commitments that might have formed the basis for a lower unit price. The penalties bear no relationship to increased costs or lost revenue: the mere issuance of a Request for Information or Request for Proposals will not materially increase costs or reduce revenues. Their practical effect is to eliminate any real possibility of competition.

I. THE PENALTY PROVISIONS ARE ANTI-COMPETITIVE, UNJUST, UNREASONABLE AND CONTRARY TO THE PUBLIC INTEREST

Amendment 57's penalty provisions were designed to be anti-competitive and they are. As noted above, the penalty is triggered not just when a competitor begins service or even when NAPM actually signs an agreement with a competitor. The penalty provisions are much more aggressive; they impose a price increase on NAPM at the very beginning of any competitive process. All NAPM need do is *request* an offer from a competitor and the rates for porting transactions increase substantially – in 2007 back nearly to where they were prior to the adoption of Amendment 57.

The penalty provisions' financial penalty on potential competition is not small change. If a competitive selection process and adoption of a competitive alternative took a year from start to finish, the penalty would be about $27 million dollars at the 2007 volume of "porting transactions" and well over $30 million at expected 2008 levels – and that number is continually rising. With that size penalty, one can understand why NAPM would not even try to seek a competitor – it would cost carriers and consumers $27 million or more in penalty charges even before a competitor could begin service.

Indeed, the anticompetitive effect of the penalty provisions is even greater than these numbers suggest. Because Amendment 57 *penalizes the beginning of the*

competitive process, the risk of seeking competition is enormous. Since one cannot know at the start of any contracting process how it will turn out, NAPM would have to pay the penalty charges not knowing whether an alternative contract would actually be signed, how long it would take to do so (and every day increases the cost of the penalty), or how much it would save. NAPM would at least have to consider the worst case: if it issued an RFI in 2007 and then failed to reach an alternative agreement with another provider, it could end up owing well in excess of $150 million in penalties by the time the contract ended. Although it self-evidently makes sense to have competition in the long-term, Amendment 57's penalty provisions are drafted in such a way that it would be almost irrational for NAPM to look for a competitor. The effect of Amendment 57, therefore, is simple: NAPM will not – almost cannot – take any steps to bring competition to number porting administration until 2012. The penalty provisions, thus, are contrary to Commission policy and antithetical to the public interest.

Amendment 57 does include a provision saying that the porting administration contract is "non-exclusive" – and permits NAPM to receive "unsolicited" proposals. While NAPM has suggested that competition is possible because of this non-exclusivity clause and because it can review unsolicited proposals – this possibility is a sham. Or, more precisely, it comes with a cost of somewhere between $30 million and $150 million dollars (or more) – which makes it effectively a sham. Put another way, the Master Agreement as amended by Amendment 57, while not an exclusive contract on its face, functions as an exclusive contract because of the anticompetitive effect created by the penalty provisions.[15]

[15] *Cf. Antitrust Guidelines for the Licensing of Intellectual* Property, § 4.1.2 (1994) (stating under the Government's Guidelines a "license that does not explicitly require exclusive dealing may have the

Indeed, penalty provisions like those in Amendment 57 are prohibited by the antitrust laws. The maintenance of a monopoly through an exclusionary contract (*i.e.*, a contract prohibiting customers from dealing with a competitor) is a clear violation of Section 2 of the Sherman Act. *E.g., LePage's, Inc. v. 3M*, 324 F.3d 141, 157-159 (3d Cir. 2003) (upholding Section 2 monopolization liability based on exclusive dealing, including, *inter alia*, discounting linked to exclusivity, even where prices are not below cost). That Amendment 57's exclusivity is achieved through discounting rather than by using the term "exclusive" is irrelevant. As the Third Circuit has explained,

> *3M also disclaims as exclusive dealing any arrangement that contained no express exclusivity requirement. Once again the law is to the contrary.* No less an authority than the United States Supreme Court has so stated. In *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 5 L.Ed.2d 580, 81 S.Ct. 623 (1961) . . . the Court took cognizance of arrangements which, albeit not expressly exclusive, effectively foreclosed the business of competitors.

LePage's, 324 F.3d at 157 (emphasis supplied).

Contract provisions requiring exclusive dealing also violate Section 1 of the Sherman Act where, as here, the seller has market power. *See United States v. Visa USA, Inc.*, 344 F.3d 229 (2d Cir. 2003) (finding credit card companies' exclusivity contracts with banks illegal under Section 1).[16] Contractual discount provisions that have the "practical effect" of inducing exclusive dealing are also unlawful under Section 1 where the seller has market power. *See Tampa Elec.*, 365 U.S. at 326.[17] Since it has 100% of

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effects of exclusive dealing if it is structured to increase significantly a licensee's costs when it uses competing technologies.")

[16] *See also Lepage's*, 324 F.3d at 157 ("Even though exclusivity arrangements are often analyzed under § 1, such exclusionary conduct may also be an element in a § 2 claim.")

[17] *See* Herbert Hovenkamp, *Antitrust Law* (2005) §§1801 (outlining basic exclusive-dealing principles) and 1807 (reviewing exclusivity achieved through, inter alia, "anticompetitive discounting"). *See also FTC v. Brown Shoe Co.*, 384 U.S. 316, 318-20 (1966) (declaring unlawful shoe manufacturer's agreement to pay valuable consideration, including discounts on shoes, to retailers that promise not to

the market, NeuStar is plainly maintaining a monopoly under Section 2 standards and has market power under Section 1 – and that power has induced NAPM to agree to penalty provisions that violate the antitrust laws. This is not a case of parties in a competitive market negotiating a contract with permissible exclusivity. Rather, it is a case where a provider with monopoly power has obtained an unlawful exclusive contract for the provision of public services, in a market created by Congress and the Commission.

Because the penalty provisions of Amendment 57 violate the ban imposed by the Sherman Act on exclusive dealing agreements by monopolists and others with market power, they must be found contrary to the public interest. This is because in determining the public interest, the Commission must take antitrust policies into account. *See U.S. v. F.C.C.*, 652 F.2d 72, 81-2 (D.C. Cir. 1980); *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). As the Supreme Court has said, "competitive considerations are an important element of the 'public interest'" standard which governs federal agency decisions. *U.S. v. F.C.C.*, 652 F.2d at 82 (citing *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C.Cir.1968)).

Finally, the penalty provisions of Amendment 57 are unjust and unreasonable under the Commission's traditional analysis that "just and reasonable" rates must be determined on the "basis of cost."[18] Here, there is no possible cost basis for the penalty provisions. Moreover, the exclusionary nature of the penalty provision itself, in a

purchase shoes of manufacturer's competitors); *Carter Carburetor Corp. v. FTC*, 112 F.2d 722, 732 (8th Cir. 1940) (holding that carburetor maker's discount for customers agreeing not to buy competitors' carburetors was unlawful even where customers were not required "to affirmatively promise in express terms" not to handle competing goods); *United States v. Linde Air Products Co.*, 83 F. Supp. 978, 983 (N.D. Ill. 1949) (finding unlawful contract providing discount on welding rods in exchange for customer's agreement not to buy rods from a rival).

[18] *MCI Telecommunications Corp. v. F.C.C.*, 675 F.2d 408, 410 (D.C. Cir. 1982).

contract by the sole provider of number portability database administration services, also renders the penalty an unjust and unreasonable practice.

II. BY ELIMINATING COMPETITION THE PENALTY PROVISION HARMS THE PUBLIC

In 2007 it should not be necessary to argue that competition benefits the public. And that is nowhere more true than in the awarding of contracts for the provision of a public service; contracts like the Master Agreement and Amendment 57. This is why the Commission always relies on competition to ensure maximum performance of its public contracts. *See, e.g.*, 47 U.S.C. § 309(j)(1); 47 C.F.R. § 1.2104(g). And it is why, as noted above, the Commission recognized "that there are clear advantages to having at least two experienced number portability database administrators that can compete with . . . each other." *Second Report and Order,* 12 FCC Rcd at 12306. It is also why the Commission has used the fair and open competitive bidding process to select the North American Numbering Plan Administrator and the national thousands-block Pooling Administrator, the two other major aspects of number administration under the Commission's jurisdiction. *See Administration of the North American Numbering Plan*, Report and Order, 11 FCC Rcd. 2588, 2615-2618 (1995) ("*North American Numbering Plan*"); *Numbering Resource Optimization,* Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 7574, 7637-7644 (2000) ("*Numbering Resource Optimization*").

In selecting the numbering administrator, the Commission declared that the "selection [of the numbering administrator] should ensure that the best qualified NANP Administrator is selected in a fair and efficient manner." *North American Numbering Plan*, 11 FCC Rcd. at 2616. The Commission later stated that the NANC's process had

succeeded because it had been "open and fair" and included the opportunity for "participation from all segments of the telecommunications industry." *Administration of the North American Numbering Plan; Toll Free Service Access Codes,* Third Report and Order, 12 FCC Rcd. 23040, 23075 (1997) ("*Third Report and Order*"). As the Commission noted, "[a]s a general matter, federal law assumes that competitive procedures best serve the public interest." *Numbering Resource Optimization,* 15 FCC Rcd. at 7638-7644.

Competition between number portability database administrators would also result in benefits for the industry and consumers. First, competition ensures that the industry, and thus consumers, gets the best service for the best price for number portability. *See Request for Review of a Decision of the Universal Service Administrator by Cincinnati City School District*, Order, 21 FCC Rcd. 5994, 5997 (2006). Telcordia believes that introduction of competition would lead quickly to number porting administration services being offered at a rate at least 20% less than the cost now being charged. Telcordia conservatively estimates that, if open bids were held now and new contracts took effect January 1, 2008, by the time the penalty provisions would expire on January 1, 2012, the industry and consumers would have saved a minimum of an additional $240 million – and likely much more.[19] No set of serial negotiations with a sole provider can yield such dramatic savings (and, of course, Amendment 57 does not allow NAPM even to ask for lower prices from NeuStar until 2012).

[19] The savings were determined assuming a conservative increase of transaction volumes of 20% the first two years and 10% the last three years. The historical transaction increase rate has been significantly higher than 20% the last several years. It is notable that under Amendment 57, with even a modest increase in transaction volume of 10%/year, NeuStar's revenues increase notwithstanding its volume discount schedule.

Second, competition ensures that the best qualified administrators are selected and that the most efficient services are obtained. *Second Report and Order*, 12 FCC Rcd. at 12306. Competition allows the Commission to gauge an administrator's qualifications and assures NAPM and the public that the best administrators are selected.

Third, competition provides the incentives necessary to develop and implement the most innovative methods to solve number portability challenges. *See, e.g.*, 47 U.S.C. 309 (j)(3)(B); *Numbering Resource Optimization,* 15 FCC Rcd. at 7638-7644. An administrator, without true competition, has no incentive to explore new methods; there is no impetus for innovation.

Fourth, the competitive process will provide the greatest opportunity to diversify number porting administration. The Commission has already affirmed the benefit of diversification: "[w]e recognize that vendor diversity for number administration services has advantages for the industry because it prevents the industry from being captive to a single, monopolistic provider for these services." *Third Report and Order*, FCC Rcd at 23075-6. Amendment 57 creates the captivity that the Commission feared.

The bottom line is Amendment 57 imposes significant harms – including increased cost, decreased efficiency and decreased effectiveness – on the public.

III. UNSOLICITED BIDS ARE INSUFFICIENT TO PERMIT COMPETITION

Amendment 57 stands as an eloquent statement on the importance of the competitive bidding process in public contracts. It was not adopted as part of such a process, but rather as part of a closed process. To bring the possibility of competition back into number portability administration, it is now necessary for NAPM to initiate a public process seeking proposals from potential competitors to NeuStar.

Under Amendment 57, NAPM effectively can do nothing more than passively receive unsolicited bids from potential competitors (it cannot, of course, accept any such offer). This is not a substitute for an open competitive process and does not allow any realistic hope of creating competition for the provision of number porting administration services. As the NAPM Vendor Proposal Advisory Committee noted, "[o]nly a cursory vendor comparison is possible without defined requirements (*i.e.*, 'level playing field')."[20] The information that is currently publicly available does not contain these requirements. Without a specific Request for Proposal or other information from NAPM, an unsolicited bidder cannot obtain the defined requirements necessary to make an effective bid. But under Amendment 57, NAPM cannot provide needed information through ordinary bidding procedures without triggering the penalty provisions.

If the penalty provisions were not bad enough, Section 9 of Amendment 57 provides that any "discussions or negotiations . . . concerning any amendment or proposed amendment" are confidential until completion or cessation. This means that if NAPM negotiated yet another contract extension with NeuStar, competitors would not know about it until after the extension were signed. *And there have already been three such contract extensions without any competitive process*, in 2000, 2003, and 2006. Under this closed process, other bidders could not even learn about the negotiations, let alone present bids, during the negotiations. Both unsolicited bidders and NAPM are handicapped by this closed process. NAPM simply cannot – without triggering the penalty provisions of Amendment 57 – have a contracting process that is fair, efficient, or

[20] *See* Exhibit C at 4 (May 19, 2005 NAPM LLC Vendor Proposal Advisory Committee).

open to "participation from all segments of the telecommunications industry." *See Third Report and Order*, 12 FCC Rcd. at 23076.

The shortcomings of an unsolicited bid process are not hypothetical. In February 2005 (before Amendment 57 was adopted) Telcordia sought permission from NAPM to submit a proposal.[21] NAPM invited Telcordia to submit an in-person proposal during a meeting open to the public.[22] Telcordia presented a proposal on March 16, 2005. But because NeuStar joined the NAPM representatives for the presentation, Telcordia could not present proprietary information that was critical to any real evaluation of the proposal. Telcordia offered to present the confidential information at a time when NeuStar would not be present. Telcordia was never offered that opportunity.

Telcordia did not hear from NAPM for six months, at which time NAPM simply requested ownership neutrality information. Telcordia responded to the neutrality information request in October 2005. After an ownership change, the NPAM contacted Telcordia in December 2005 and requested more ownership neutrality information. Telcordia responded to that request in May 2006. Telcordia was never asked to submit the additional proprietary information with regard to its proposal or given further instructions regarding the additional requirements (business and technical) for a bid. In fact, there were no further communications from NAPM. Amendment 57 was adopted in September 2006 after six months of negotiations with NeuStar, at least suggesting a connection between the discounts granted in Amendment 57 and the threat of competition by Telcordia. This would also explain, of course, why Amendment 57 was designed to eliminate the threat of future competition.

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[21] *See* Exhibit D (February 8, 2005 email from Tom Mazzone to Karen Mulberry).

[22] *See* Exhibit E (February 24, 2005 email from Suzanne Howard to Tom Mazzone).

The bottom line is that submitting an unsolicited bid for a complex contract like number portability administration services is like target shooting while blindfolded – you may not even shoot in the right direction and the chance of a bull's-eye is about zero.

IV. THE COMMISSION SHOULD USE ITS AUTHORITY TO REFORM AMENDMENT 57 AND ORDER NAPM TO OPENLY SOLICIT COMPETITIVE SERVICES

Because Amendment 57's penalty provisions are anticompetitive, unjust, unreasonable and contrary to the public interest, the Commission has the duty to reform Amendment 57 by eliminating those provisions.[23] And there is no doubt that the Commission has authority to do so. *See Western Union Telegraph Co. v. F.C.C.*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (finding that under the *Sierra-Mobile* doctrine, the Commission has power to "modify provisions of private contracts when necessary to serve public interest"). In 1996, Congress required the Commission to establish requirements for number portability.[24] Congress also declared in the Telecommunications Act that "the policies and purposes of this Act" include "vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."[25] The Commission is therefore obligated to reform Amendment 57 to remove the anticompetitive provisions and require NAPM to undertake an open, competitive bidding process.

While it has delegated general oversight of number portability to the NANC, the Commission has ultimate authority over number portability matters. *Second Report and Order*, 12 FCC Rcd. at 12351. The NANC is simply a federal advisory committee

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[23] Amendment 57 also arguably violates the Competition in Contract Act, 41 U.S.C. § 253(a)(1)(A) that requires full and open competition whenever the government acquires goods or services.

[24] 47 U.S.C. § 251(a)(2); 47 U.S.C. § 251(e)(2).

[25] 47 U.S.C. § 257(b).

created by the Commission whose authority is limited to providing advice and recommendations. *See* 5 U.S.C. Appx. § 9.[26]

Moreover, in the *Second Report and Order* the Commission adopted, on an interim basis, the NANC's recommendation that the LLCs provide immediate oversight and management of the local number portability administrators. *Second Report and Order*, 12 FCC Rcd. at 12345, 12346-7. This immediate oversight included negotiating Master Agreements with the local number portability administrator. *Id.* at 12346-7. [27] The Commission also adopted the NANC's recommendation that the NANC in turn provide oversight of the seven individual LLCs (now NAPM), subject to Commission review, and NAPM operating agreements accepted the NANC in this oversight role. *Id.* at 12336-7.[28] The LLCs also agreed to comply with Commission directives, and the local number portability administrators *(i.e.* NeuStar) are obligated to comply with such directives pursuant to the terms of the Master Agreement. *Id.* at 12337. And in the Master Agreement itself, Section 25 specifically acknowledges the Commission's authority over the terms of the Agreement in general and the effects of Amendment 57 in

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[26] "The purpose of the [NANC] is to advise the [Commission] and to make recommendations, reached through consensus, that foster efficient and impartial number administration." Charter of the North American Numbering Council, originally filed Oct. 5, 1995, on file with Competition Policy Division, Wireline Competition Bureau, FCC (*available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-2753A2.pdf).

[27] The Commission in the *First Report & Order* delegated authority to the Chief, Common Carrier Bureau, "to monitor the progress of the NANC in selecting the LNPA(s) and in developing and implementing the database architecture . . . ." *Id.* at 8393, 8403.

[28] The NANC has reviewed Amendment 57. On February 7, 2007, Telcordia asked the NANC to "discuss the reasonableness, fairness and lawfulness of the new terms and conditions in the extension provision [Amendment 57]." Exhibit F (February 7, 2007 Letter from Telcordia to Chairman Koutsky) NeuStar and NAPM, at NANC Chairman Thomas Koutsky's invitation, responded to Telcordia's request. Exhibit B (April 13, 2007 Letter from Michael O'Connor to Chairman Koutsky), Exhibit G (April 11, 2007 Letter from Dan Scuillo to Chairman Koutsky) (exhibits omitted). NANC discussed Amendment 57, Telcordia's request, and NeuStar's and NAPM's responses at its April 17, 2007 meeting.

particular. As a result, the Commission has (as one might expect) complete authority over the NANC, NAPM, and Amendment 57.[29]

The Commission not only has plenary authority over NAPM and Amendment 57, it is has an obligation to provide strict oversight – as it does over any program under its auspices that involve the movement of large amounts of money. *Changes to the Board of Directors for the National Exchange Carrier Association*, Comments of the Federal Communications Commission, Office of Inspector General, CC Docket 97-21 (filed Oct. 18, 2005) ("*OIG Comments*"); Government Accountability Office Report to the Chairman, Committee of Energy and Commerce, House of Representatives, 05-151 (February 9, 2005). Such oversight includes "timely Commission action on policy matters and timely guidance from the Commission regarding unclear provisions of the statute and commission rules." *OIG Comments* at ¶ 2.

The Commission has also never hesitated to exercise its authority to strike down agreements subject to its authority that violate Commission policy. For example, the Commission has long had a policy of voiding carrier operating agreements or portions of operating agreements that violate Commission policy. *See AT&T Corporation Country Direct Service Agreement with Telecommunicaciones Internacionales de Argentina Telintar*, Memorandum Opinion and Order, 11 FCC Rcd. 13893, 13896 (1996); *AT&T Corporation Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relied and Petition of WorldCom, Inc. for Prevention of "Whipsawing" on the U.S.-Philippines Route*, Memorandum Opinion and Order, 18 FCC

[29] In addition, the NANC explicitly recommended that parties utilize this authority if not satisfied with a decision by an LLC or local number portability administrator. *See Second Report and Order*, 12 FCC Rcd. at 12338 (citing *NANC Working Group* at §§ 4.4.4 - 4.4.6).

Rcd 3519, 3535-38 (2003); *Atlantic Tele-Network, Inc. Application for Authority to Acquire and Operate Facilities for Direct Service Between the U.S. and Guyana*, Order, Authorization and Certificate, 6 FCC Rcd. 6529 (1991) (striking down a clause in the operating agreement between ATN and its affiliate that violated the Commission's policy requiring proportionate return). In the *Telintar* case, the operating agreements at issue were commercial contracts entered into by private parties. 11 FCC Rcd. at 13896. Nevertheless, the Commission struck portions of the operating agreements that provided for exclusivity on the grounds that they violated the Commission's policy in favor of competition. *Id.* In the *Stop Payment* case, the International Bureau (later affirmed by the Commission) ordered U.S. carriers to abrogate provisions of their correspondent agreements with Philippine carriers because those provisions violated Commission policy. 18 FCC Rcd at 3535-38. In this case, since Amendment 57 is a public contract, the Commission's authority is even clearer.

Telcordia seeks no changes in the current system of Commission oversight of the number porting process. The system, in which contract negotiation and administration rests with a neutral industry body with Commission oversight only when necessary, is well-designed. As this Petition demonstrates, if and when something goes awry it can always be brought to the Commission's attention. The anticompetitive provisions here only became public in November and, following a quick review by NANC, are now ripe for consideration by the Commission. This is how the system was designed, and there is no reason to believe it does not work. The Commission now can, and should, reform Amendment 57 by eliminating its anticompetitive provisions.

Specifically, the Commission should strike the following sections: Section 8.3 in its entirety; all references to an Upward Triggering Event; Section 9 in its entirety; and Section 13.2 in its entirety. Striking these sections will remove the anticompetitive language from Amendment 57 – while at the same time providing NeuStar with the legitimate benefit of its bargain (a truly non-exclusive contract extension) and providing NAPM with the benefit of its bargain (rates that are lower than they had been). The Commission should also use its plenary authority to instruct NAPM to initiate and complete in a timely matter – for the first time since NeuStar became the sole provider of numbering portability services a decade ago – an open, fair and reasonable process requesting competitive proposals for number portability administration services. The repeated contract extensions in the absence of a public process, along with NAPM's agreement to keep the existence of future contract extension negotiations secret, demonstrates that only a mandated open process for this public service will serve the public interest. Moreover, any number portability administrator(s) should be required to cooperate in the design and implementation of an effective competitive process that allows for multiple vendors as originally intended. The public deserves no less.

CONCLUSION

The issues here are really quite simple. Amendment 57 provides a devil's bargain. Porting rates were reduced, but only when NAPM agreed not to seek competitive services or to do business with a competitor. Understandably, faced with a bird in the hand, NAPM agreed. But the practical effect of Amendment 57's penalty provisions is to eliminate any real possibility of competition for number porting services until at least 2012 and – because of the provision mandating that future negotiations be